



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

May 3, 2022

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Impartiality Determination to Participate in Certain Matters Involving California Environmental Protection Agency

FROM: Justina Fugh **FUGH** Digitally signed by JUSTINA FUGH
Date: 2022.05.03
15:56:53 -04'00'
Alternate Designated Agency Ethics Official and Director, Ethics Office

TO: Grant Cope
Senior Counselor to the Administrator

As Senior Counselor to the Administrator of the United States Environmental Protection Agency (EPA), you seek permission to participate in specific party matters involving the California Environmental Protection Agency (CalEPA). Prior to being selected for this Schedule C position, you served as Deputy Director of the Department of Toxic Substances Control for CalEPA.

Pursuant to Executive Order 13989 and the Biden Ethics Pledge that you signed upon appointment, political appointees are prohibited from participating in specific party matters in which their former employer or former client is a party. However, state government is excluded under the definition of “former employer.”¹ Therefore, the Ethics Pledge does not apply to your CalEPA employment.

However, what remains is an impartiality concern under the federal ethics rules set forth in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, specifically Subpart E, “Impartiality in Performing Official Duty.” Upon assuming the position of Senior Counselor to the Administrator, you have a “covered relationship” with CalEPA pursuant to 5 C.F.R. § 2635.502(b)(1)(iv). For one year after you resigned from CalEPA, absent an impartiality determination from an EPA ethics official, you cannot participate in any specific party matter in which CalEPA is a party or represents a party if the circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality. *See* 5 C.F.R. § 2635.502(a).

Federal ethics regulations permit federal employees to participate in matters that might

¹ *See* Exec. Order 13989, Section 2(k), which provides that “‘former employer’ does not include...State or local government.”

raise impartiality concerns when the interest of the federal government in the employee's participation outweighs concern over the questioning of the "integrity of the agency's programs and operations." 5 C.F.R. § 2635.502(d). The factors that the Agency takes into consideration are:

- (1) the nature of the relationship involved;
- (2) the effect that resolution of the matter will have upon the financial interest of the person affected in the relationship;
- (3) the nature and importance of the employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter;
- (4) the sensitivity of the matter;
- (5) the difficulty of reassigning the matter to another employee; and
- (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality.

In reviewing these factors, I have concluded that the interest of the United States Government in your participation outweighs any concerns about your impartiality, and I am authorizing you to participate as Senior Counselor to the Administrator in particular matters that involve CalEPA with the following limitation: you must recuse yourself from participation in specific party matters in which you participated personally and substantially while employed with CalEPA. In making this determination, I have taken the following factors into consideration:

Nature of the relationship involved – Since 2018, you served as Deputy Director of the Department of Toxic Substances Control at CalEPA and managed the statewide cleanup program. From 2013-2018, you served as Deputy Secretary for Environmental Policy at CalEPA. Sensitivities regarding your impartiality will necessarily revolve around the issues in which you participated personally and substantially for CalEPA. States share responsibility with EPA in protecting human health and the environment. With respect to many of our statutes, EPA has directly delegated states with regulatory and enforcement authority. In fact, EPA works closely and directly with state governmental entities on a continuing and frequent basis.

Effect of the matter upon your financial interest – I understand that you have a defined benefit plan with the State of California. Although you have a financial conflict of interest pursuant to 18 U.S.C. § 208, it is not disqualifying. See 5 C.F.R. §§ 2640.201(c)(1)(ii) and 2640.201(c)(2). In EPA's experience, it is unlikely you as Senior Counselor will be in any position to affect the State's ability or willingness to pay benefits to its retirees.

Nature and importance of the employee's role – As Senior Counselor, you serve as a key advisor to the Administrator. In this role, you are expected to communicate freely with states and localities and will be asked to participate in discussions and meetings related to particular matters that affect California.

Sensitivity of the matter – We anticipate that there will be specific party matters in which you did not participate personally and substantially for CalEPA that will rise to your level of attention, merit your participation and raise nationally significant issues.

Difficulty of reassigning the matter to another employee – Your participation as Senior Counselor in such matters will be of importance to the Administrator, and therefore in the Agency's interests. In these situations, it may not be appropriate to reassign the matter to another employee.

Under this limited authorization, you are authorized to participate in specific party matters that involve CalEPA, but not on the very same specific party matters on which you worked on personally and substantially while employed by CalEPA. With respect to any particular matters involving CalEPA as a specific party and in which you previously participated personally and substantially, you have voluntarily agreed, pursuant to our advice, not to participate at all for the duration of your EPA tenure. In the event that EPA believes it has a compelling reason for your participation as an EPA official on any of those same specific party matters that you participated in personally and substantially, then you or your office may ask OGC/Ethics to reconsider the factors and information listed above on a case-by-case basis. Unless and until you receive written authorization, you must continue to recuse yourself from those matters in which you had previously participated while OGC/Ethics considers whether the Agency's interest in your participation outweighs any impartiality concern. Please note, however, that OGC/Ethics does not provide professional responsibility advice, so you will need to consult your own bar counsel about rule 1.11.

While I have issued you this determination to interact with CalEPA with the limitation described above, you may wish to make adjustments to your duties to not participate in a particular matter that involves CalEPA as a specific party. Nothing in this impartiality determination precludes you from making additional adjustments to your duties, such as voluntarily recusing from other matters, although you are advised to consult with OGC/Ethics should such a circumstance arise.

If you have any questions regarding this determination, or if a situation arises in which you need advice or clarification, please contact me at fugh.justina@epa.gov or (202) 564-1786.

cc: Dan Utech, Chief of Staff
Alison Cassady, Deputy Chief of Staff